DEWAN UNDANGAN NEGERI KELANTAN & ANOR.

v.

NORDIN SALLEH & ANOR. (2)

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
EDGAR JOSEPH JR SCJ
[CIVIL APPEAL NO. 01-2-92]
3 APRIL 1992

ADMINISTRATIVE LAW: *Judicial review - Whether the exercise of discretion by the Court below in allowing reinstatement of the plaintiffs lawful - Whether such exercise of the said quantum of discretion by the learned Judge may be contended as breach of the rules of natural justice - Whether the said consequential orders and remedy granted by the Court below right or fair - Particularly when the grant of such relief would directly effect the incumbent state assemblymen - Who were not parties to those proceedings at the Court below - Whether non-joinder is material - Whether this is a matter of discretion for the Courts.*

CONSTITUTIONAL LAW: *Pursuant to the Supreme Court primary declaration - Vide the principle appeal - On the constitutional validity of Article XXX1A(1) Kelantan State Law - Which was declared as null and void - Whether the purported removal of the plaintiffs from membership of the state legislative assembly is null and void - Whether plaintiffs entitled to reinstatement - Whether lawful to grant the said consequential orders.*

CONSTITUTIONAL LAW: *Doctrine of substantive fairness - Whether may be invoked by Courts to give effect to natural justice if this may impinge upon the substance of a decision of the Courts - Whether in the circumstances of the instant case it would be imperative to rely on presumptions inclined towards fundamental rights guaranteed by Malaysian Constitution.*

CIVIL PROCEDURE: *Power of the Court to make binding declarations of right - Order 15 r. 16 RHC 1980 - Whether Article 118 of the Federal Constitution and s. 32 of the Election Offences Act 1954 - To apply - Whether relevant to the issue upon appeal - Plaintiffs not challenging validity of the said by-election.*

In the instant appeal which is closely connected to the principal appeal, the following contentious issues were put before the Court.

(1) that the removal of the first and second plaintiffs from the membership of the State Legislative Assembly of Kelantan and the declaration by the Assembly that their seats had fallen vacant as on 3 July 1991 were void and of no effect.

(2) that consequently, the two notices issued by the Speaker of the Legislative Assembly of Kelantan, who is the second defendant to the Election Commission, were also void and of no effect, and

(3) that since the Election Commission had acted on the invalid void notices the by-election conducted by the Election Commission on 26 August 1991, and the consequent election of Haji Samat and Haji Mahmud for the constituencies concerned were also void, and

(4) accordingly, in granting the declaration prayed for by the plaintiffs, that they are and continue to be lawful members of the State Legislative Assembly of Kelantan, the learned Judge had acted without jurisdiction.

Held:

[1] A law which is invalid for unconstitutionality and Article XXX1A(1) of Part One of the Constitution of Kelantan is to the extent indicated in the judgment in the Principal Appeal, such a law is invalid *ab initio* and makes all decisions thereunder invalid. Nor can such a law be enforced or confer any legal rights.

[2] It follows that since the plaintiffs had been removed from membership of the State Legislative Assembly of Kelantan pursuant to an invalid and void law, their removal was wrongful and, consequently, the subsequent election of Haji Samat and Haji Mahmud was also wrongful. In such circumstances, the learned Judge in the Court below was entitled in the exercise of his discretion to declare accordingly and to further declare that the plaintiffs were entitled to reinstatement.

[3] Rules of the High Court by O. 15 r. 16 confers power upon that Court to make binding declarations of right. Having regard to these matters, Article 118 of the Federal Constitution and s. 32 of the Election Offences Act 1954, pale into insignificance and are irrelevant to the issue arising upon this appeal especially so since the plaintiffs were not challenging the validity of the by-election upon any of the grounds stipulated under s. 32.

[4] As for the other contention based upon the breach of the rule of natural justice, *to wit*, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the Court below seeking declaratory reliefs and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position and therefore they should have been made parties to those proceedings.

[5] A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain.

[6] There is substance in the submission that the State Legislative Assembly of Kelantan is, in reality, fighting the suit on behalf of Haji Samat and Haji Mahmud. The learned Judge was not prevented from making the declarations prayed for in the exercise of his discretion, not withstanding the fact that two of the persons interested in the subject matter of the declarations were not before the Court.

[7] In any event, the Courts may invoke the doctrine of substantive fairness, the effect of which is that natural justice may impinge upon the substance of a decision. In the particular circumstances of the present appeal, there are ample grounds to invoke the doctrine of substantive fairness. It follows that the non-joinder is a matter which should be condoned in the exercise of the Court's discretion.

[8] A final point by way of a general observation needs to be made. The Lord President has succinctly pointed out that in construing constitutional documents it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. Whenever legally permissable the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by our Constitution, enjoying as they do, precedence and primacy.

[Appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG PENTADBIRAN: *Kajian semula kehakiman samaada - Penggunaan budibicara oleh Mahkamah di bawah dalam membenarkan penempatan semula plaintif sah - Samaada penggunaan kuantum budibicara oleh Hakim Yang Arif boleh dinyatakan sebagai pelanggaran rukun keadilan asasi - Samaada perintah susulan itu dan remedi yang diberikan oleh Mahkamah di bawah itu saksama - Pemberian perintah ini akan membawa kesan tertentu terhadap ahli Dewan Undangan semasa - Bukanlah pihak yang terlibat dalam prosiding di Mahkamah Tinggi - Sam ada ketakcantuman adalah material - Samaada ini adalah perkara budibicara untuk Mahkamah.*

UNDANG-UNDANG PERLEMBAGAAN: *Selaras dengan pengisytiharaan Mahkamah Agung - Melalui rayuan utama - Samaada sah atau tidak Artikel XXX1A(1) undang - Undang Negeri Kelantan yang telah diisytiharkan sebagai tak sah dan tak berkesan - Samaada pemecatan plaintif dari keahlian Dewan Undangan Negeri itu tak sah dan berkesan - Samaada plaintif berhak untuk ditempatkan semula pada kedudukan asalnya - Samaada sah untuk memberikan perintah susulan itu.*

UNDANG-UNDANG PERLEMBAGAAN: *Doktrin saksama tersendiri - Samaada boleh dibangkitkan oleh Mahkamah untuk memberikan keadilan asasi yang akan membawa kesan atas keputusan Mahkamah - Samaada dalam keadaan kes ini sah untuk bergantung pada anggapan-anggapan yang mirip kepada hak asasi yang dijamin oleh Perlembagaan Persekutuan.*

PROSEDUR SIVIL: *Kuasa Mahkamah untuk melakukan pengisytiharan sah - O. 15 r. 16 RHC 1980 - Samaada Artikel 118 Perlembagaan Persekutuan dan s. 32 Akta Kesalahan Pilihanraya 1954 - Terpakai - Samaada kaitan dengan isu yang dirayu - Plaintif tidak mencabar sah atau tidak pilihanraya kecil yang berkenaan.*

Dalam rayuan ini mempunyai kaitan yang rapat dengan kehakiman Ketua Hakim Negara dalam rayun utama, isu-isu pertikaian yang berikut dikemukakan pada Mahkamah.

(1) bahawa perlucutan plaintif pertama dan kedua dari keahlian badan perundangan Negeri Kelantan dan pengisytiharan yang dibuat oleh Dewan Undangan Negeri Kelantan bahawa keahlian mereka sebagai ADUN yang dikosongkan pada 3 Julai 1991 itu tak sah dan tak berkesan.

(2) ekoran dari itu, kedua-dua notis yang dikeluarkan oleh Speaker badan perundangan Negeri Kelantan yang merupakan defendan kedua selain Suruhanjaya Pilihanraya, jua tak sah dan tak berkesan

(3) oleh kerana Suruhanjaya Pilihanraya telah bertindak berasaskan notis-notis yang tak sah itu, maka pilihanraya kecil yang dilaksanakan oleh Suruhanjaya Pilihanraya pada 26 Ogos 1991, dan ekoran dari itu, pemilihan Haji Samat dan Haji Mahmud untuk kerusi Dewan Undangan Negeri yang tertentu itu juga tak sah dan berdasarkan hujah-hujah itu dengan membenarkan pengisytiharan yang didoa oleh plaintif, bahawasanya mereka sedang dan terus akan tetap menjadi ahli-ahli sah badan perundangan Kelantan, Hakim Yang Arif telah bertindak diluar bidangkuasanya.

Diputuskan:

[1] Bahawasanya, suatu undang-undang yang tak sah kerana bertentangan dengan perlembagaan dan Mahkamah ini telah memutuskan bahawa Artikel XXX1A(1) Bab satu perlembagaan Kelantan pada tahap yang dinyatakan sepertinya dalam penghakiman rayuan

utama dan undang-undang itu tak sah *ab initio* dan semua keputusan yang dibuat di bawah kemudian darinya juga tak sah. Malah undang-undang ini tidak boleh dikuatkuasakan atau kurniakan apa-apa hak perundangan.

[2] Berikut darinya, memandangkan plaintif telah dipecat sebagai ahli badan perundangan Negeri Kelantan selaras dengan satu undang-undang yang tak berkuatkuasa dan tak sah, pemecatan mereka itu salah dan akibatnya, pemilihan semula Haji Samat dan Haji Mahmud juga tak sah. Setelah mengambil keputusan seperti ini, Hakim Yang Arif di Mahkamah di bawah berhak menggunakan budibicaranya dan seterusnya memegang dan mengisytiharkan bahawa plaintif berhak untuk ditempatkan kembali kepada kedudukan yang asal.

[3] Kaedah-kaedah Mahkamah Tinggi O. 15 r. 16 kurniakan kuasa pada Mahkamah untuk mengisytiharkan hak-hak yang boleh dikuatkuasakan. Berdasarkan perkara-perkara ini, Artikel 118 Perlembagaan Persekutuan dan s. 32 Akta Kesalahan Pilihanraya 1954 menjadi bayangan dan tidak penting dan dengan hormat ditolak sebagai tidak kena-mengena dengan isu yang berbangkit dalam rayuan ini khususnya memandangkan plaintif tidak mencabar perihal sahnya pilihanraya atas apa-apa alasan yang ternyata di bawah s. 32.

[4] Sehubungan dengan lagi satu perkara yang dipertikaikan berdasarkan kemungkiran rukun keadilan asasi, yang mencungkil pendapat yang bijak, bahawa Haji Samat atau Haji Mahmud tidak menjadi pihak yang terlibat dalam prosiding Mahkamah di bawah dengan doa untuk mendapatkan relief pengisytiharan atau dibicara; memanglah benar bahawa pemberian relief seperti ini akan dan seperti peristiwa-peristiwa kemudian membuktikan secara langsung telah mengugat kedudukan mereka dan mereka seharusnya dijadikan sebagai pihak-pihak yang terlibat dalam prosiding tersebut.

[5] Ketidak-pemberian peluang untuk dibela/dibicara adalah satu kesalahan yang personal pada pihak yang menanggung kesakitan. Sekiranya pihak seperti ini tidak membuat aduan, bukanlah menjadi urusan pihak lain untuk membuat aduan.

[6] Ada kebenaran dalam rumusan hujah yang menyatakan bahawa badan perundangan Kelantan yang sebenarnya melawan guaman bagi pihak Haji Samat dan Haji Mahmud. Mahkamah ini berpendapat bahawa Hakim Yang Arif tidak dilarang dari membuat pengisytiharan yang didoakan itu dalam penggunaan budibicara beliau, walaupun berasaskan fakta bahawa dua orang yang ada mempunyai kepentingan tertentu dalam intipati pengisytiharan berkenaan tidak ada di Mahkamah.

[7] Walaubagaimanapun, Mahkamah boleh menggunakan doktrin saksama tersendiri, kesannya tidaklah keadilan asasi boleh meninggalkan kesan terhadap inti pada suatu keputusan. Memandangkan pada keadaan dalam rayuan ini ada begitu banyak alasan-alasan yang membolehkan doktrin saksama tersendiri digunakan. Berikut darinya, non-joinder itu adalah satu perkara yang harus menebusi penggunaan budibicara Mahkamah.

[8] Satu poin akhir secara pemerhatian am hendaklah dinyatakan. Ketua Hakim Negara secara terperinci telah pun menyatakan bahawa dalam tafsiran dokumen perlembagaan adalah menjadi jelas dan terang tanpa bukti bahawa motif yang mulia dan kemahuan yang amat baik sahaja tidak cukup untuk penggantian halangan perlembagaan. Bila-bila secara sah jika dibenarkan andaian hendaklah dibuat untuk menyandar ukuran keadilan pada pihak hak asasi yang dijamin oleh perlembagaan kita, yang mana akan terus menikmati keutamaan dan kedudukan yang tertinggi.

[Rayuan ditolak dengan kos.]

Cases referred to:
Kunstler v. Kunstler [1969] 3 All ER 673 ***(cit)***
Majumder v. A.G of Sarawak [1967] 1 MLJ 29 ***(cit)***
Chop Chuah Seong v. Teh Chooi Nai & Ors. [1963] MLJ 66 ***(cit)***

Ibenewaka v. Egbuna [1964] 1 WLR 219 ***(foll)***
Brickfields Properties v. Newton [1973] 3 All ER 328 ***(foll)***
Sutherland Shire Council v. Leyendekkers [1970] 91 WN (SSW) 250 ***(cit)***
Acs v. Anderson [1975] 1 NSW 212 ***(foll)***
Vine v. National Dock Labour Board [1956] 1 All ER ***1 (reff)***
J.B. Jeyaratnam v. PP [1990] 1 MLJ 129 ***(cit)***
Marbury v. Madison 1 Cranch 137 [1803] ***(cit)***
Tun Datuk Hj. Muhammed Adnan Robert v. Tun Datuk Hj. Mustapha bin Datuk Harun [1987] 1 MLJ 471 ***(cit)***
Mallock v. Aberdeen Corp. [1971] 1 WLR 1578 ***(cit)***
Merdeka University Bhd. v. Govt. of Malaysia [1981] CLJ (Rep) 191 ***(cons)***
Cheall v. APEX [1983] 2 AC 180 ***(cons)***

Legislation referred to:
Constitution of the State of Kelantan, art. XXX1A(1)
Election Offences Act 1954, s. 32
Federal Constitution, art. 118
Rules of the High Court 1980, O. 15 r. 16

Other source referred to:
Shorter Constitution of India, Durga Das Basu, 10th Edn. [1989], p. 201
Constitutional Politics, Glendon A. Schubert

For the appellants - Zainur Zakaria (Zulkifli Noordin with him); M/s Zainur Zakaria & Co.
For the respondents - Dato' Zaki Tun Azmi (Juliana Solomon with him); M/s. Rashid & Lee

JUDGMENT

Edgar Joseph Jr SCJ:

I have had the advantage of reading the draft judgment of Tun Abdul Hamid LP in the Principal Appeal, being Appeal No. 44/9l, with which the present appeal is closely connected, and am in complete agreement with it and have nothing to add.

I must now address the issues which arise for decision in the present appeal.

Encik Zainur Zakaria, Counsel for the appellants (the first and the second defendants), in outlining the agreed facts upon which he relied, pointed out that consequent to the State Legislative Assembly of Kelantan (the first defendant) having passed the resolution pursuant to the impugned legislation referred to in the judgment of the Lord President, the first and the second respondents (the first and the second plaintiffs) had ceased to be members of the State Legislative Assembly of Kelantan, and had had their seats for the constituencies concerned declared vacant, and a by-election had been conducted by the Election Commission, wherein the first and the second plaintiffs had stood for election as candidates, but were defeated whilst the victorious candidates were Haji Samat bin Mamat and Haji Mahmud bin Haji Yaacob.

Yet, said Counsel, neither Haji Samat nor Haji Mahmud or even the Election Commission, had been made parties to the proceedings in the Court below, thereby denying them the opportunity of being heard, so that there had been a breach of the rules of natural justice.

It was further argued by Counsel that neither Haji Samat nor Haji Mahmud could be removed from the State Legislative Assembly of Kelantan, save and except by virtue of a declaration made by an Election Judge declaring their election void, made pursuant to an election petition, regard being had to the provisions of Article 118 of the Federal Constitution and s. 32 of the Election Offences Act 1954, (Act 5) which read as follows:

Article 118 of the Federal Constitution

118. No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

Section 32 of the Election Offences Act 1954 (Act 5)

32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge:

(a) that general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those before enumerated or not have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) that the candidate was at the time of his election a person disqualifed for election.

It followed, said Counsel, that in holding as he did in fact hold:

(1) that the removal of the first and the second plaintiffs from the membership of the State Legislative Assembly of Kelantan and the declaration by the Assembly that their seats had fallen vacant as on 3 July 1991, were void and of no effect,

(2) that consequently, the two notices issued by the Speaker of the Legislative Assembly of Kelantan, who is the second defendant, to the Election Commission, were also void and of no effect, and

(3) that since the Election Commission had acted on the invalid and void notices, the by-election conducted by the Election Commission on 26 August l99l, and the consequent election of Haji Samat and Haji Mahmud for the constituencies concerned were also void,

and, accordingly, in granting the declaration prayed for by the plaintiffs, that they are and continue to be lawful members of the State Legislative Assembly of Kelantan, for the constituencies concerned, the learned Judge had acted without jurisdiction.

In support, Encik Zainur cited *Kunstler v. Kunstler* [1969] 3 All ER 673, *Majumder v. Attorney General of Sarawak* [1967] 1 MLJ 29 and *Chop Chuah Seong v. Teh Chooi Nai & Ors.* [1963] MLJ 66.

It would be more convenient if I dealt with the second of Counsel's contentions first.

I accept, as indeed I am bound to, that the grant of declaratory relief is discretionary. However, whilst it is easy to cite a plethora of cases for the proposition that Courts should grant declarations sparingly, in my view this would be misleading. Nowadays, the Courts recognise the advantages

of the declaration, and therefore pay little attention to the early cases. So, for example, in the Privy Council case of *Ibeneweka v. Egbuna* [1964] 1 WIR 219/224-225 Lord Radcliffe said this:

> The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealously', with 'extreme caution', with 'the utmost caution'. These are indeed Counsels of moderation, even though as Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent Judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

It goes without saying that ideas change as to what is "a proper sense of responsibility". The minimum requirement must be to achieve justice between litigants and that is: "a subject on which experience may teach the Courts of one generation to take what they may regard as wider or more liberal view than that of their predecessors". (See *Brickfields Properties v. Newton* [1973] 3 All ER 328, 335 per Sachs LJ (speaking of the rules of practice and procedure)).

Street J in *Sutherland Shire Council v. Leyendekkers*, [1970] 91 WN (SSW) 250 made specific reference to the above passage in *Ibeneweka* and concluded (at p. 258) that the "anxious warnings" in the older cases (to the effect that declarations should not be granted lightly) "now find no legitimate place in the exercise of the discretion to grant declaratory relief". His Honour went on to observe that if the warnings were not intended to bind future Judges, then they could be disregarded as unnecessary. But if they were regarded as offering real guidance: "then they could lead to error. A judicial attitude of pre-conceived reluctance to grant declaratory relief could amount to a vitiating element in the exercise of the discretion.

And, in *Acs v Anderson* [1975] 1 NSW 212 at 218, 219, Mahoney JA, said this:

> In the exercise of this discretion there is no simple formula or rule of thumb which will easily produce the proper result; to use a phrase adapted by Lord Radcliffe in another context, Judges may not hope to arrive at a just result ' in feather-beds, it is not the way', but only by the anxious weighing of, and judgment upon, the factors involved. Nor, in my opinion, is it possible to lay down in advance that a declaration cannot be appropriate in a particular field or a particular class of case; omniscience is not an attribute which Judges have or ought to aspire to, and I am conscious that, where it is said that a particular context or class of case is not the proper subject of a judicial intervention, the events have a habit of requiring the qualification of the generality.

I must next refer to the following passage in the judgment of Jenkins LJ in the Court of Appeal in *Vine v. National Dock Labour Board* [1956] 1 AER 1 at 8 paras. G - H, approved of by Viscount Kilmuir LC on appeal to the House of Lords [1956] 3 AER 939, 944 B, and with which I respectfully agree:

> As my Lord has said the granting of a declaration is a matter of discretion, and the learned Judge, in the exercise of his discretion, thought fit to make a declaration in this case. Further, his decision in the exercise of his discretion should not be disturbed unless this Court can be satisfied that he proceeded on some wrong principle.

Now, turning to the particular circumstances of the present appeal, Counsel for the plaintiffs Dato' Zaki Tun Azmi had explained, in answer to the Court, that he had not proceeded by way of an Election Petition under s. 32 of the Election Offences Act 1954, because none of the grounds specified thereunder were applicable.

It is pertinent to note that if the plaintiffs were correct in their contentions in the Principal Appeal, and we have held that they were, then their removal from the membership of the State Legislative Assembly of Kelantan consequent upon the declaration by the Assembly that their seats had fallen vacant as on 3 July, was void and of no effect. I am supported in this by both principle and authority to which I should now like to refer.

Now, a law which is invalid for unconstitutionality - and we have held that Article XXXIA (1) of Part One of the Constitution of Kelantan is, to the extent indicated in the judgment of the Lord President in the Principal Appeal, such a law - is invalid *ab initio* and makes all decisions thereunder invalid. [See *J.B. Jeyaratnam v. PP* [1990] 1 MLJ 129, 135 Col. 1, I; Durga Das Basu, *Shorter Constitution of India*, 10th Edn. [1989], p. 201. Nor can such a law be enforced or confer any legal rights. (See *Marbury v. Madison* 1 Cranch 137 [1803] which has been called "the rib of the **American Constitution**" by Glendon A. Schubert, *Constitutional Politics*; *Tun Datuk Haji Muhammed Adnan Robert v. Tun Datuk Haji Mustapha bin Datuk Harun* [1987] 1 MLJ 471, 483 col. 1, A to E)

It follows that since the plaintiffs had been removed from membership of the State Legislative Assembly of Kelantan, pursuant to an invalid and void law, their removal was wrongful and, consequently, the subsequent election of Haji Samat and Haji Mahmud was also wrongful. In such circumstances, the learned Judge in the Court below was entitled, in the exercise of his discretion, to declare accordingly, and to further declare that the plaintiffs were entitled to reinstatement.

These orders by the learned Judge were really of a consequential nature being consequent upon his having decided the issue of the constitutional validity of Article XXXIA (1) in favour of the plaintiffs. Not to have granted these consequential orders would have reduced his Lordship's ruling on the constitutional issue to a mere judicial snapshot, a remedy which records but changes nothing, and would plainly have been neither right nor fair. It is noteworthy that the Rules of the High Court by O. 15 r. 16 confers power upon that Court to make **binding** declarations of right. Having regard to these matters, Article 118 of the Federal Constitution and s. 32 of the Election Offences Act 1954, pale into insignificance and, with respect, are irrelevant to the issues arising upon this appeal especially so since the plaintiffs were not challenging the validity of the by-election upon any of the grounds stipulated under s. 32.

As for the other contention based upon the breach of the rule of natural justice, to wit, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the Court below seeking declaratory reliefs, and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position, and therefore they should have been made parties to those proceedings. That, however, is not conclusive of the issue before us. Those proceedings had right from the start received considerable treatment in the local Press, and both Haji Samat and Haji Mahmud must have known about them; yet they remained passive and did nothing; they made no attempt to apply to be joined as defendants, which they certainly could have done. A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain.

I find, therefore, that there is substance in the submission of Counsel for the plaintiffs that the State Legislative Assembly of Kelantan is, in reality, as he put it, fighting the suit on behalf of Haji Samat and Haji Mahmud.

In this context, I consider the following passage in the judgment of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v. Egbuna* [1964] 1 WLR 219, 266 to be apt:

> ... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the Court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented - the Obosi people - and had fought the case on that basis, and where, as here, the trial Judge took the view that the interested parties not represented were in in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the Judge from making a declaration of title in the respondents' favour.

Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned Judge was not prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the Court.

In any event, in certain circumstances, the Courts may invoke the doctrine of substantive fairness, the effect of which is that natural justice may impinge upon the substance of a decision, as the following case will serve to illustrate.

In *Mallock v. Aberdeen Corporation* [1971] 1 WLR 1578 at 1582, Lord Reid said this:

> It was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer.

The observations of Lord Wildberforce (at pp. 1594-1595) and Lord Simon (at p. 1600) to the like effect are also noteworthy.

In *Merdeka University Bhd. v. Government of Malaysia* [1981] CLJ (Rep) 191, Abdoolcader J (as he then was) had occasion to refer to the observation of Lord Reid in *Mallock*, quoted above, and said this: "This seems to imply that the discretion to refuse a remedy may be exercised when the Court judges that natural justice would make no difference or that there was no prejudice".

The problem of an "inevitable result" had arisen again in the House of Lords in *Cheall v. APEX* [1983] 2 AC 180 where the House upheld a submission that it would have been "a cruel deception" to observe natural justice where nothing could be said that would affect the outcome.

In the particular circumstances of the present appeal, not forgetting that the basic question which arises for decision is the constitutional validity of Article XXXIA (1) - a question of construction and therefore a pure question of law - and the fact that neither Haji Samat nor Haji Mahmud, who it was said had been denied the opportunity of being heard, had made any attempt to be joined as co-defendants, I consider that there are ample grounds to invoke the doctrine of substantive fairness. Having therefore considered the merits of the case I am of the view that it has been clearly demonstrated that even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the Court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the Court's discretion.

As for the non-joinder of the Election Commission, in the proceedings in the Court below, I do not consider that this in any way prevented the learned trial Judge from granting the declaration prayed for in the exercise of his discretion. The Election Commission was merely charged with the responsibility of conducting the election and it would, of course, be indifferent to the result of the election; its rights being in no way at stake.

In any event, even had it been made a party to the proceedings in the Court below, I am completely convinced that it would have made no difference to the result of the litigation, so that it could not be said that there was a real likelihood of it having suffered any prejudice.

Looking back, a final point by way of a general observation needs to be made. The Lord President has succinctly pointed out that in construing constitutional documents it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. I would add that whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by our Constitution, enjoying as they do, precedence and primacy.

In all the circumstances, I would dismiss this appeal and with costs. Deposit to the plaintiffs to account of their taxed costs.

I have been asked by the Lord President to say that he and the other members of the Court concur in this judgment.

Also found at [1992] 2 CLJ 1140